U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
2370 Route 70 West
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue date: 04Oct2001

CASE NO.: 1993-LHC-00645

OWCP NO.: 08-093087

In the Matter of

HERBERT ZENON

Claimant

v.

PORT COOPER/T. SMITH STEVEDORING

COMPANY, INC.

Employer

DECISION AND ORDER UPON SECOND REMAND FROM THE BENEFITS REVIEW BOARD

ISSUES

On remand, the Board has instructed me to determine:

1. What is Claimant's post-injury wage-earning capacity in light of the evidence of record and the factors enumerated in Section 8(h); and

2. Whether the award of augmented attorney's fees is proper in light of Claimant's success in prosecuting his claim.

FACTS AND PROCEDURAL HISTORY

On October 2, 1988, Claimant fell and injured his left shoulder while working for Employer as a walking foreman. Claimant underwent surgery in April and September of 1991 to repair the damage to his shoulder. As part of settling an initial dispute, Employer and Claimant stipulated that a release to light-duty work would allow him to return to his job as a walking foreman under normal circumstances.

In September 1992, Claimant's treating physician, Dr. William Bryan, determined that Claimant could return to work with certain restrictions. A formal hearing was scheduled when the parties disputed whether this meant Claimant could return to his former job as a walking foreman. Prior to the hearing, Employer offered Claimant an opportunity to return to work as a walking foreman within his physical restrictions.

In my first decision, I found this to be a good faith offer and determined that Claimant's total disability compensation should end as of the date of the offer subject to readjustment if he availed himself of the offer and it turned out to be less than full-time employment. Dec. and Order Awarding Benefits ¶ 4 (Oct. 28, 1993). I also found that Claimant's condition reached maximum medical improvement on September 30, 1992. *Id.* at 6. Finally, I awarded Claimant compensation under the schedule for a 20 percent arm impairment. *Id.* at 8.

The Board affirmed my decision on September 12, 1996, pursuant to Pub. L. No. 104-134, 110 Stat. 1321 (1996). Employer and Claimant appealed my decision to the United States Court of Appeals for the Fifth Circuit. In its decision, *Zenon v. Port Cooper/T. Smith Stevedoring Company, Inc.*, 182 F.3d 913 (5th Cir.1999) (table), the court reversed my decision and remanded for a determination of the date Claimant was released for light duty, at which time his compensation for temporary total disability terminated. The court also held that if I determined Claimant was never released to light-duty work, his temporary disability compensation would end on the date of maximum medical improvement. The court also vacated my award for permanent total disability benefits and held that Claimant must establish such entitlement by proving causation. Finally, the court noted the parties agreement on appeal the my scheduled award was in error.

Upon remand from the Fifth Circuit, I found that Claimant was never released to perform light-duty work "under normal circumstances". Dec. and Order Upon Remand ¶ 7 (Dec. 21, 1999). I also found that Claimant's injury and physical condition are causally related to his work-related accident of October 2, 1998. *Id.* at 9. Accordingly, I awarded Claimant permanent partial disability pursuant to section 908 (c)(21).[1] *Id.*

[1] I found that Claimant was entitled to a continuing award for permanent partial disability from April 23, 1993, based upon the difference between the parties' stipulated average weekly wage of $623.19 and the wage

On Claimant's motion for reconsideration, I vacated this award and awarded Claimant permanent total disability from October 1, 1992, the day after the his shoulder injury reached maximum medical improvement. Ord. Granting Mot. for Reconsideration and Modifying Previous Dec. and Ord. ¶ 3 (Feb. 8, 2000). In a supplemental decision, I granted Claimant's motion to enhance a prior fee award, due to the delay in payment, to reflect counsel's current rate of $200 per hour. Supp. Dec. and Ord. Awarding Attys. Fees ¶ 2 (March 23, 2000).

On appeal, the Board vacated my award of permanent total disability benefits but found that the Fifth Circuit's decision did not preclude Claimant's entitlement to permanent partial disability benefits based upon a loss of wage-earning capacity. *Zenon v. Port Cooper/T. Smith*, BRB No. 00-0798, slip op. at 5 (BRB Mar. 30, 2001). First, the Board noted that the Fifth Circuit acknowledged that Claimant might be entitled to a permanent partial disability award if it was establish that his shoulder impairment is work-related. *Id.*[2] Second, the Board stated that establishing suitable alternate employment does not necessarily establish that Claimant does not have a loss in wage-earning capacity. *Id*. Since I did not discuss the wages of the position offered or analyze Claimant's wage-earning capacity pursuant to Section 8(h) of the Act, they could not read the Fifth Circuit's decision as precluding permanent partial disability.

Furthermore, the Board acknowledged that part of Employer's burden of demonstrating suitable alternative employment includes establishing the general number hours claimant would be expected to work and a general rate of pay for the position. *Id.* at 6. Contrary to my previous decision, the Board found there was sufficient evidence upon which to establish this. *Id*. Therefore, the Board remanded this case for determination of Claimant's post-injury wage-earning capacity in light of the evidence of record and the factors enumerated in Section 8(h). *Id* at 7.

Finally, Employer challenged my decision to grant Claimant's request to augment the hourly rate charged for work performed between October 1990 and November 1993, while the case was initially pending before this court. The Board concluded that the augmented hourly rate must be reconsidered in light of Claimant's post-injury wage-earning capacity and, therefore, the extent of his success in prosecuting his claim. *Id.* at 8.

---

offered to Claimant by Employer on April 22, 1993.

[2] I previously determined that Claimant's shoulder impairment was work-related in my decision upon remand from the Fifth Circuit.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[3]

Employer's Argument Concerning The Offer of Employment

Employer's initial contention is that Claimant is not entitled to any disability benefits because he did not accept the walking foreman position. Employer maintains that according to my original decision awarding benefits, the only way for Claimant to recover permanent disability would be to take the job offered and show that it did not provide as much employment as he had before his injury. Employer's Br. on Second Remand ¶ 18 (April 27, 2001). Employer's argument amounts to an assertion that because Claimant did not avail himself of the employment offer to establish his actual wages, he is precluded from claiming permanent partial disability.

A claimant's "wage-earning capacity" is "determined by his actual earnings if such actual earnings fairly and reasonably represent his wage earning capacity." 20 U.S.C. § 908(h). However, if this is not the case or the employee has no actual earnings, wage-earning capacity may be reasonably fixed, "having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future." *Id.* I am obligated to consider and discuss all of the record before deciding Claimant's post injury wage-earning capacity. *McCurly v. Kiewest Co.*, 22 BRBS 115, 119-20 (1989).

Employer ignores the fact that evidence of *actual* earnings is not *required* to fix Claimant's wage-earning capacity. 20 U.S.C. § 908(h); *See Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 88 (5th Cir. 1990)(actual earnings are not sole controlling factor in determining wage earning capacity). The statute clearly states other factors by which to 'reasonably fix' wage-earning capacity if a claimant has no *actual* earnings. *Id.* Furthermore, the Board has held that a claimant is not required to avail himself of any particular offer of employment in order to maintain disability entitlement. *See Hoopes v. Todd Shipyards Corp.*, 16 BRBS 160, 162 (1984)(claimant's choice to stay at home with her child rather than search for work does not affect entitlement to compensation). For whatever reason, Claimant's decision not to accept the walking foreman's position does not preclude him from receiving disability benefits.

Employer's Argument Concerning Claimant's Wage-Earning Capacity

Employer further argues that since Claimant has no actual wages, the wages of O.R. Emanuel should be used to establish Claimant's wage-earning capability. Mr. Emanuel worked for Employer as a walking foreman for some twenty-five or twenty-six years. (TX 183). He injured both his knees in a work related accident but continued to work for Employer as a walking foreman within his physical

[3] The following reference will be used herein: EX for Employer's exhibit, CX for Claimant's exhibit, and TR for the hearing transcript.

limitations. (TX 190-93). After Mr. Emanuel's retirement, Employer was left with four walking foremen and they assert that Claimant simply could have taken his place. Employer argues that Claimant's and Mr. Emanuel's work restrictions are similar and therefore Claimant's earning capacity is equivalent to that of Mr. Emanuel. As I did not address this evidence in my decision on reconsideration, I have been instructed to examine this testimony as it bears upon the issue of wage-earning capacity. *Zenon v. Port Cooper/T. Smith*, BRB No. 00-0798, slip op. at 7 (BRB Mar. 30, 2001).

As part of its burden of demonstrating suitable alternative employment, Employer must establish the general number of hours Claimant would be expected to work and a general rate of pay for the position. *See generally Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039 (5th Cir. 1992). There is no question that the rate of pay for a walking foreman is $17.35 per hour. (CX 13(j)). Employer correctly states that the only question left is how much work would be available for Claimant based upon their job offer.

The record evidence establishes that Mr. Emanuel worked an average of 2,419 hours a year from 1986 - 1992. (CX 13(g)). Employer urges that Claimant could reasonably expect to work on average the same number of hours that Mr. Emanuel had. At walking foreman wages, this would result in average annual earnings of $41,969.65 without considering any overtime or holiday pay. By contrast, Claimant worked an average of 1287 hours in the six years before his injury, which is reflected in his lower earnings of $32,405.88 in the fifty-two weeks prior to his accident. (CX 13(c)). Employer asserts that Claimant has not established any loss of wage earning capacity because the walking foreman position offered to him would allow him to work more hours and earn more than he did prior to his injury.

Employer also points to the testimony of their vice-president, Mr. Richard Atkinson, for the assertion that Claimant would be able to work at least as many hours as he did previously. Employer urges that Mr. Atkinson's testimony establishes that there is a system whereby its walking foreman rotate work in order to match their abilities and medical disabilities. Mr. Atkinson is in charge of selecting the walking foremen and placing them at the jobs. (TR 269). He testified that he was able to employ O.R. Emanuel as a walking foreman even though he had injuries to both knees. (TR 192, 272). Mr. Atkinson testified that he left it up to Mr. Emanuel to determine what kinds of physical tasks he was capable of performing, especially climbing into ship holds. (TR 273). In fact, Mr. Emanuel testified that Mr. Atkinson never required him to go into the hold of a vessel. (TR 193). According to Mr. Atkinson, he believed that workers with disabilities can offset them if they "really want to work" and utilize their other skills. (TR 273).

However, Employer's offer of the walking foreman job does not meet that requirement that it establish the general number of hours Claimant would be expected to work. *See generally Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039 (5th Cir. 1992). Upon being asked if he was willing to hire Claimant as a designated walking foreman, Mr. Atkinson stated:

> I'm willing to let the man have a shot to see where he goes. If he can manage men and do an adequate job, then I will work him into the rotation, but I'm not going to let someone say he has a disability. But we do use extra foreman and I do know that we're negotiating with some shipping lines and there's an opportunity that I might need additional foremen in the future. I'm hopeful of that but I can't say right now.

(TR 282)

When asked if he could employ Claimant immediately as a walking foreman, he was not able to state how frequently he would be able to use Claimant based upon the work he had at the time. (TR 290). He testified that he was anticipating an increase in business for his company in the future. (TR 295). He stated that when his company started hiring outside or irregular foremen, then they could start using Claimant, but that he would not replace one of his regular walking foremen at the moment. (TR 285). Mr. Atkinson stated that he would work him into the regular rotation "if events worked out" and "after he shows what he can do" (TR 290), but also testified that "I cannot commit him to a regular job before I see he's a regular person." (TR 291).

Additionally, from the evidence it appears that Claimant would not be *able* to perform the job of walking foreman for Employer. As Mr. Emanuel termed it, the job of a walking foreman was to do "anything that had to be done" to make sure ships were unloaded. (TX 184). In 1986 while performing his duties, Mr. Emanuel injured his knees when a cargo container fell and threw him on his knees. (TX 191). He did not have surgery on his knees but underwent therapy and rehabilitation. (TX 191). Despite this, his knees caused him some problems due to the requirements as a walking foreman. (TX 190-93). Mr. Emanuel testified that it was not necessary to go down into the hold every time to unload a ship. (TX 195). However, he testified that on general cargo boats doing his walking foreman job required him to go down into the hatch to assist his gang. (TX 185). Mr. Emanuel testified that although this was less of a requirement with ships carrying steel, he was still required on occasion to do so. (TX 185). On occasion, the walking foreman position required him to climb into the hold to supervise his gang when hooking up different kinds of cargo. (TX 186-87). He also testified that when unloading Australian ladder ships, cargo would often block these ladders and the longshoremen had to climb out using ladders or be lifted out. (TX 190). Mr. Emanuel testified that the toughest part of his walking foreman job was "climbing that ladder" because of the injury to his knees. (TX 191). Finally, Mr. Emanuel testified that although the ship superintendents would go into the hold if necessary, there were times that he felt that the safest way to do things would be for him to go into the hold himself. (TX 197).

In a previous decision, after a thorough review of the evidence, I determined that the position of walking foreman requires a degree of physical exertion that is beyond Claimant's capacity. Dec. and Order Upon Remand ¶ 4-7 (Dec. 21, 1999). Although this finding was in relation to an unmodified walking foreman's position, I do not find that the record evidence establishes that the position offered by Employer would be within Claimant's restrictions either. In a finding not disturbed on appeal, I stated:

> Although there is conflicting testimony on the extent of the physical demands of the job, I am convinced that at a minimum, walking foreman are required to regularly climb up and down ladders to reach the cargo hold to effectively do their job. The physical restrictions placed upon Claimant by Dr. Bryan prevent from [doing] this essential function of the job. In making this determination, I find that Claimant's testimony regarding his duties as a walking foreman to be most probative of the issue. His description of the position was consistent with and fully supported by numerous credible witnesses who have previously supervised walking foremen or worked as walking foremen themselves.

Id. at 7.

Thus, Employer's assertion that Claimant's wage-earning capacity is equivalent to Mr. Emanuel's fails in two respects. First, Employer has not established the general number of hours Claimant could expect to work. Second, the nature of Claimant's injury and work restrictions would still prevent him from doing the walking foreman job offered to him. Employer's argument to equate Mr. Emanuel's and Claimant's wage earning capacity ignores the fact that their work restrictions are not the same. There is no evidence that Mr. Emanuel was medically restricted from climbing more than eight rungs on a ladder as the Claimant is. Finally, although not required to do so, it is clear from his testimony that Mr. Emanuel still must, and was able to, climb down into the hold when necessary. (TR 186,188,195, 196).

Therefore, I find that the record evidence does not establish the general number of hours Claimant could or would be expected to work by the record evidence. Since I find that Claimant's wage-earning capacity is not equivalent to Mr. Emanuel's, I must reasonably fix his wage-earning capacity according to the factors enumerated in section 8(h) of the Act.

Wage-Earning Capacity Pursuant to Section 8(h) of the Act

A. Nature of Injury and Degree of Physical Impairment

Of record is the deposition testimony of William J. Bryan, M.D., who first examined Claimant on February 6, 1991. (CX 1 at 9). Dr. Bryan determined that Claimant had an injured rotator cuff arising out of his previous work injury. *Id.* at 11-12. Dr. Bryan performed two surgeries on Claimant to repair the damage to his shoulder. *Id.* at 16,21. After surgery and rehabilitation, it was his opinion that Claimant's permanent restrictions are such that he should not climb or descend a ladder which has more than eight rungs, cannot operate a tow motor or a large vehicle, should not lift over 35 pounds, and should not lift above his shoulder. *Id.* at 26; (CX 1 at 24; CX 1, Exhibit 4). Dr. Bryan stated Claimant has a "twenty percent impairment of his left upper extremity. . . that probably translates to . . . a three or four percent impairment of the whole person." (CX 1 at 28). In a previous decision in this matter, I found Dr. Bryan's medical opinion to be credible and accepted it as accurately characterizing Claimant's physical limitations. Dec. and Order Awarding Benefits ¶ 5 (Oct. 28, 1993). In another decision, I found that Claimant had established by a preponderance of the evidence that his injury and present physical condition is causally related to his work-related accident of October 2, 1988. Dec.

and Order Upon Remand ¶ 9 (Dec. 21, 1999).

There is additional evidence of the impact of Claimant's injury from William Kramberg, a rehabilitation counselor at the firm of Lopez-Kramberg Incorporated. Kramberg Depo. Tr. 177 (July 13, 1993). Mr. Kramberg is certified by the US Department of Labor to provide services under the LHWCA. *Id.* at 178. He based his opinion on Dr. Bryan's May 5, 1992 work restriction form, discussions with Claimant, documentation from Claimant's former employer, and the job description in the Dictionary of Occupational Titles[4] about the physical and climbing requirements of employment as a walking foreman. *Id.* at 185-86. In Mr. Kramberg's opinion, it is not possible for Claimant to return to work as a walking foreman, nor any other waterfront job, because of the physical, and in particular climbing, demands of the work. Kramberg Depo. Tr. 186, 89, 95-96 (July 13, 1993).

C. Claimant's Usual Employment

Claimant's "usual employment" is his regular duties at the time he was injured. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 692 (1982). Claimant was a longshoreman for Employer at the time of his injury and worked on the waterfront for some eighteen years. (TX 219; CX 13(d)). From the medical opinions and other evidence of record, Claimant will not be able to return to work as a longshoreman in any of his former capacities. Furthermore, it is clear from the record testimony that Claimant will need substantial adult education and/or assistance in obtaining employment outside the longshore setting.

D. Other Factors and Circumstances

At this point in time, Claimant is 63 years old and possesses only a fourth-grade education. (TX 225). He cannot read, write, does not have a checking account, and could not balance a checkbook even if he did. (TX 226). According to Mr. Kramberg's reports, Claimant scored below third grade level in all basic academic skills and is a poor candidate for adult basic education. (CX 15). He stated that Claimant, "[f]or all practical purposes. . . is substantially academically deficient and basically illiterate in academic skills, unable to spell beyond a one-syllable word, very limited in his ability to even do basic addition and subtraction, and was unable to even read single syllable words." Kramberg

---

[4] A "walking foreman" falls under the title of header, dock boss, gang boss, hatch supervisor, ship supervisor, or stevedoring supervisor. *Dictionary of Occupational Titles* 911.137-018 (4th ed. rev. 1991). An individual with this job "[s]upervises and coordinates activities of STEVEDORE (water trans.) II engaged in loading and unloading ships' cargoes: Assigns duties to workers, and explains methods of handling, stowing, securing cargo, and setting up hoisting equipment. Determines what cargo requires special handling and how it is to be stowed in ship's hold. Signals WINCH DRIVER (water trans.) to raise or lower cargo. May estimate dunnage (paper and timber) required to brace and arrange cargo in ship's hold to prevent cargo damage. May maintain inventory of dunnage." *Id.*

Depo. Tr. 182 (July 13, 1993).

He further noted that Claimant is a marginal candidate for vocation services due to his work restrictions, age, and educational deficits. (CX 15). Mr. Kramberg pointed out that Claimant would have trouble filling out a simple employment application for the minimum wage-type jobs that might be within his physical and educational constraints. Kramberg Depo. Tr. 187-88 (July 13, 1993). In fact, it was Mr. Kramberg's recommendation that Claimant pursue his disability options. *Id.* at 187; (TX 228). Although Mr. Kramberg's office did not pursue alternative employment options with Claimant, this is not surprising given his recommendation to Claimant that he seek disability compensation instead. *Id.* at 188-89.

Even so, there is at least minimal evidence that Claimant is capable of other employment.[5] There is the deposition testimony of Employer's vocational witness, Lorie McQuade-Johnson. Ms. McQuade-Johnson expressed her opinion that, based upon his previous work experience, Claimant is employable in the Houston area in the minimum wage to five dollars per hour range.[6] McQuade-Johnson Depo. Tr. 296 (July 13, 1993). She stated that Claimant qualifies for a variety of light and sedentary unskilled jobs despite his education and physical limitations. *Id.* at 299-300. Ms. McQuade-Johnson stated that with assistance, such as job readiness training, Claimant could secure this type of job. *Id.* at 298. She also felt it would be beneficial in this regard if Claimant participated in some type of adult basic education and secured his GED. *Id.* at 297. She noted that the Department of Labor has programs to assist injured workers covered by federal injury compensation statutes. *Id.* at 303.

Based upon the evidence, it is evident that Claimant will not be able to return to work as a walking foreman or as a longshoreman in any capacity. He is significantly impaired by his limited education and would only be able to secure unskilled labor positions. Therefore, I find that Claimant's wage-earning capacity is equivalent to five dollars per hour.

Calculation of Claimant's Wage-Earning Capacity

For non-specific permanent-partial disability, "the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial

---

[5] Indeed, it appears that Mr. Kramberg implicitly acknowledged that minimum wage positions within his physical and educational constraints could be obtained. Kramberg Depo. Tr. 187-88 (July 13, 1993).

[6] Ms. McQuade-Johnson also concluded that Claimant would be able to return to work as a walking foreman with Employer despite his physical restrictions. McQuade-Johnson Depo. Tr. 33 (July 13, 1993). However, in light of the other evidence in the record and her limited knowledge of the duties of a walking foreman, her opinion deserves considerably less weight on this issue. *Id.* at 154-65.

disability." 20 U.S.C. § 908(c)(21). At Claimant's wage-earning capacity of five dollars per hour, in an average 40 hour work week this would amount to $200 per week. However, should Claimant's wage-earning capacity turn out to be less after presenting himself for employment, he may seek modification of this award. *See* 33 U.S.C. § 922.

Ms. McQuade-Johnson identified jobs that are within Claimant's capabilities at her deposition on July 13, 1993. Claimant's permanent partial disability status begins thereafter. *See Palombo v. Director, OWCP*, 937 F.2d 70, 76 (2d Cir. 1991)(date available alternative employment first shown begins partial disability status). From October 1, 1993 to July 13, 1993, Claimant is entitled to permanent and total disability. *See Stevens v. Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir. 1990)(claimant's disability is total during period between maximum medical improvement to date suitable alternative employment shown)

Enhancement of Attorney's Fees

On January 5, 2000, Claimant's counsel submitted a Motion for Enhancement of Attorney's Fees. Employer had not made payment on any portion of the awarded fees issued on February 16, 1994, which were subject to the Claimant's original application for fees dated November 15, 1993. This fee application covered services rendered beginning October 24, 1990 through November 8, 1993 at a rate of $160.00 per hour. Citing the delay in payment of these fees, I awarded an enhancement of the hourly rate to $200.00. Supp. Dec. and Ord. Awarding Attys. Fees ¶ 2 (March 23, 2000). Employer challenged this decision in its appeal to the Board. *Zenon v. Port Cooper/T. Smith*, BRB No. 00-0798, slip op. at 7 (BRB Mar. 30, 2001). The Board's agreed only that the "augmented hourly rate must be reconsidered on remand after the administrative law judge has determined claimant's post-injury wage-earning capacity and, therefore, the extent of claimant's success in prosecuting his claim." *Id.* at 8.

Despite an explicit statement to the contrary by the Board in its decision to remand, Employer argues that there is no mechanism under 33 U.S.C. § 928 for the enhancement of attorney's fees. The Board's decision in *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995), held that enhancement for delay in payment of attorney's fees may be an appropriate award under 33 U.S.C. § 928. If warranted, counsel's fees may be adjusted based on historical rates to reflect its present value, apply current market rates, or employ any other reasonable means to compensate claimant's counsel for the delay. *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem*., 202 F.3d 259 (4th Cir. 1999)(table). If an Employer contests its liability for compensation and is not successful, they must pay the attorney's fees necessary to that success. *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 774 (5th Cir. 1981). There is no precise rule or formula in making this determination and the Administrative Law Judge has discretion in making this equitable judgment. *Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983).

By my decision today, Employer has unsuccessfully contested Claimant's entitlement to permanent disability benefits. Another factor to consider is that Claimant's counsel has persevered and prevailed after over ten years of litigation. *See Eckerhart*, 461 U.S. at 436 (length of litigation is appropriate consideration in fee awards). Counsel has succeeded in securing for Claimant a permanent partial disability award of $282.10 per week. Claimant's previous disability award would have been $415.42 per week. This constitutes a difference of only $133.32 per week. My award of permanent partial disability to Claimant still constitutes over fourteen thousand dollars a year of compensation. Claimant has prevailed upon all of his other claims and the award of permanent partial disability is a significant achievement. *See Hamilton v. Ingalls Shipbuilding*, 26 BRBS 114, 122 (1992)(award of permanent partial disability benefits deemed successful prosecution). As I stated in my decision awarding augmented fees, "[t]he quality of Attorney Brown's representation should be available to longshore claimants who need them to achieve a level playing field with a persistent respondent as seen in this instance." Supp. Dec. and Ord. Awarding Attys. Fees ¶ 2 (March 23, 2000). In light of Claimant's significant success in prosecuting his claim, I find that the award of augmented attorney's fees is appropriate.

ORDER

It is **HEREBY ORDERED** that Port Cooper/T. Smith Stevedoring Company:

(1) Shall pay to the Claimant, Herbert Zenon,

a. Temporary total compensation from February 18, 1992 to September 30, 1992, the date of maximum medical improvement; and

b. Permanent and total disability from October 1, 1993 to July 13, 1993, the date employment within Claimant's capabilities was first identified; and

c. Permanent partial disability pursuant to § 908(c)(21) beginning July 14, 1993, to be calculated as 66 2/3 per centum of the difference between Claimant's average weekly wage of $623.19 and Claimant's wage earning capacity of $200 per week.

(2) Shall furnish or pay Claimant for such reasonable, appropriate, and necessary medical care and expenses as required, subject to the provisions of 33 U.S.C.A. § 907.

(3) Shall pay Claimant's attorney, Dennis L. Brown, Esquire, fees to be determine in a Supplemental Decision and Order.

A

Ainsworth H. Brown
Administrative Law Judge

Cherry Hill, New Jersey

Attorney's Fees

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer. Claimant's attorney has not submitted his fee application. Within thirty (30) days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Respondent's counsel who shall then have fifteen (15) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered after the informal conference. Services performed prior to that conference should be submitted to the District Director for his consideration.